Midnight Rose Hotel & Casino, Inc. and Teamsters Local Union No. 537, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 27-CA-17885-1

December 16, 2004 DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 16, 2002, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and cross-exceptions.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, as further explained below, and to adopt the recommended Order.

The sole issue now before the Board is whether the judge correctly found that the Respondent discharged union activist Maureen Ostler in violation of Section 8(a)(3) and (1) of the Act on February 13, 2002, because of her union organizing activities, rather than because of what the Respondent asserted was theft by Ostler stemming from her repeated clocking in as a bartender when she was in fact working as a cocktail waitress (which has a lower base wage rate than bartender).

Facts

The facts, more fully set forth in the judge's attached decision, are essentially as follows. In mid-November 2001, 3 cocktail waitress April Hendricks asked bartender Ostler if Ostler would be willing to switch duties with Hendricks when they were both working on the same shift. Ostler agreed to do so, and Supervisor Shelby Moon approved the plan. At that time, bartenders were paid a base wage of \$6.75 per hour, and waitresses \$5.50. When Hendricks and Ostler did not work the same shift, Ostler worked as either a waitress or bartender, depending on where she was most needed at the moment.

On the first day that Hendricks and Ostler were scheduled to work the same shift after receiving approval for their plan, November 17, Ostler affirmatively clocked in using the computerized job code for cocktail waitress, at the lower wage rate, overriding her computerized default job code as bartender. Thereafter, however, while Ostler continued to work as a waitress, she did not override her computerized default job code as bartender by affirmatively clocking in under the waitress code. (Unless Ostler clocked in using the waitress code, the timeclock would default back to her primary code, bartender.) Thus, Ostler was being paid at the \$6.75 base wage rate for bartenders while working in the \$5.50 base wage waitress Likewise, Hendricks also consistently failed to override her computerized default job code as waitress when she clocked in to work as a bartender, and she thus wound up getting paid at the \$5.50 base wage rate for waitresses while working in the \$6.75 base wage bartender job.

In January, the Union began working with Ostler and fellow employee Patricia Donch to organize the Respondent's employees. On January 16, the Union notified the Respondent in writing that the Union was beginning another organizing drive, 4 and that Donch was leading the effort.

The Respondent violated Section 8(a)(1) of the Act on several occasions during the January–February period in question. Thus, Moon asked employee Randi Carroll whether Carroll had witnessed any union activity in the casino. Carroll told Moon that not only had Carroll witnessed such activity during the past few months, but also that Carroll supported it. Moon then told Carroll that former employee Sabrina Newberry was an example of an employee who had strong prounion beliefs and who had suffered negative consequences because of those beliefs. The judge found that Moon's comments to Carroll about Newberry were an unlawful veiled threat of job loss for supporting the Union, a finding to which the Respondent does not except.

Around this time also, employee Brenda Franco told Supervisor Rebecca Vandiver that someone had solicited employee Trent Costello to support the Union's organizing campaign. In violation of Section 8(a)(1), Vandiver told Franco to stay away from the Union and not to talk to anyone about the organizing campaign, and also that the Respondent would likely close the blackjack pit if the Union attempted to organize the employees. The next day, again in violation of Section 8(a)(1), Vandiver asked Franco for the name of the person who had solicited Costello to support the Union. Franco gave Vandiver the name—Ostler.

¹ The General Counsel cross-excepts to the judge's failure to address his unopposed motion to correct several errors in the transcript. We grant this motion.

² The Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

³ All dates are November 2001 through February 2002 unless stated otherwise.

⁴ The Union had unsuccessfully tried to organize the Respondent's employees in 1998 and 2001.

In January, Shift Manager Michael Martinez heard a rumor that Ostler was organizing for the Union. Shortly thereafter, while Martinez and Moon were walking past the bar, Moon told Martinez that Ostler seemed to be spending a lot of time talking to other employees, and that Moon thought that might be a sign that Ostler was engaged in union organizing.

In January or February, the Respondent's General Manager Richard Wenschlag, in violation of Section 8(a)(1), asked antiunion employee Mark Shibe if he was aware of any union activity in the casino. Also in violation of Section 8(a)(1), Wenschlag asked Shibe to report back to Wenschlag if Shibe observed any such activity. And in further violation of Section 8(a)(1), Wenschlag recruited Shibe specifically to spy on Ostler's union activities by asking Shibe to engage Ostler in a conversation about the Union and to report Shibe's findings back to Wenschlag.

In early February, Moon performed a periodic payroll audit and discovered that Ostler had been overpaid, at the bartender rate, when she had been working as a waitress (and that Hendricks, correspondingly, had been underpaid, at the waitress rate, when she had been working as a bartender). Moon immediately reported this circumstance to Wenschlag. Without further investigating the situation, and particularly without asking Ostler for an explanation, Wenschlag decided to terminate Ostler for theft. The Respondent's food and beverage manager, Rick Pratt, then called Ostler at her home on February 13 and informed her that she was terminated for theft.

After being terminated, Ostler reported to the casino to get her final paycheck and to speak with Human Resources Director Mark Lockwood. Chief Financial Officer Scott Rhoda, Marketing Director Bob Taylor, and Food and Beverage Manager Pratt soon joined their conversation. Ostler denied to them that she had stolen anything. At one point, Ostler told Rhoda that Ostler knew that her termination was union-related. During a followup meeting, this one attended by Wenschlag and Rhoda, Ostler again voiced her suspicion that her termination was because of her union activity. Wenschlag denied it.

Analysis

We agree with the judge, for the reasons he sets forth, that the General Counsel met his initial *Wright Line*⁶ burden of establishing that Ostler's union activity was a motivating factor in the Respondent's decision to termi-

nate her. The record establishes that Ostler was squarely targeted by the Respondent as a union activist.

We further agree with the judge that the Respondent in turn failed to meet its *Wright Line* burden of establishing that it would have terminated Ostler for the asserted reason—theft—even in the absence of her union activity. Our dissenting colleague disagrees with us on that score.

Based upon his thorough analysis of the evidence, the judge found that the Respondent's asserted reason for terminating Ostler, theft, was an inflation of the situation. More specifically, the judge found that the Respondent had failed to establish that Ostler intended to steal from the Respondent by failing to clock in at the lower wage rate each time she worked as a waitress.⁷ The judge noted that although Ostler had not on her own alerted the Respondent to the overpayment, she did not, on the other hand, attempt to hide that fact from the Respondent's attention during the entire 3-month period when the Respondent failed to notice this ongoing discrepancy. The judge additionally found that customer gratuities were the main source of earnings for both bartenders and waitresses, and that the \$1.25 differential in the respective base wage rates of Hendricks and Ostler had relatively little impact—about \$10 per 8-hour shift—on their total earnings, including tips. The judge further found that Ostler failed affirmatively to override her default code as bartender each time she clocked in after November 17 because she was likely operating under two misapprehensions: (1) that the timeclock would retain the most recent job code that she affirmatively entered (i.e., the code for waitress that she entered on November 17) until she affirmatively entered a different one (which she never did); and (2) that she had wholly switched jobs with Hendricks, and that from November 17 on, she was a waitress who occasionally worked, ad hoc, as a bartender, without need to clock out as a waitress and clock back in as a bartender each time she filled in as a bartender. The judge found that Ostler's testimony showed that she was confused about the pay rate implications of her switching jobs with Hendricks (a confusion that was apparently shared by Hendricks, who also consistently failed affirmatively to clock in under the correct job code when she worked as a bartender).

In sum, the judge found that the Respondent seized upon this job code recording discrepancy as an opportunity to get rid of Ostler, the lone remaining union activist, and that the Respondent characterized Ostler's con-

⁵ The other employee actively involved in the Union's organizing campaign, Patricia Donch, had been laid off the day before, in conjunction with the Respondent's shutdown of the blackjack pit.

⁶ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁷ The judge discredited Moon's testimony that, when she had given her permission in November for Ostler and Hendricks to switch jobs with each other, she had also admonished them both to clock in under the proper job code for the duties they were going to perform on that shift.

duct as theft in order to mask the Respondent's unlawful antiunion motive for terminating her. More specifically, the judge rejected the Respondent's attempt to equate its termination of Ostler to instances where the Respondent had terminated or suspended employees for intentional and egregious misconduct such as gambling at other casinos while clocked in to work for the Respondent, thus clocking in to work on shifts that they did not actually work, and misuse of the Respondent's toll-free telephone.

We agree with the judge's thorough analysis of the evidence, with the findings he arrived at based on his analysis, and with his conclusion that the Respondent terminated Ostler in violation of Section 8(a)(3) and (1) because of her union activities. Consequently, we disagree with our colleague's view that, in analyzing the evidence, the judge was actually substituting his business judgment for the Respondent's, and second-guessing a legitimate business decision to terminate Ostler. Analyzing the relevant evidence is not an exercise in second-guessing the Respondent. It is, instead, a necessary process, in light of the complaint allegation, to determine whether or not the Respondent violated the Act.

Under Wright Line, the General Counsel has the initial burden of proving that the employee's protected activity was a motivating factor in the employer's action. If the General Counsel meets that initial burden, the burden shifts to the employer to prove that it would have taken the adverse employment action even in the absence of the employee's protected activity. E.g., McKesson Drug Co., 337 NLRB 935, 936 (2002), cited by our colleague. We agree with our colleague that (as stated in McKesson Drug, supra, at 937 fn. 7) in order for an employer to meet its Wright Line burden, it does not need to prove that the employee actually committed the alleged offense, but must, however, show that it had a reasonable belief that the employee committed the offense, and that the employer acted on that belief in taking the adverse employment action against the employee.

Here, the Respondent assertedly discharged Ostler for theft. "Theft," however, commonly involves knowingly obtaining something of value from someone else without authorization, or by threat or deception, and intending to deprive the other person permanently of the use or benefit of the thing of value. See, e.g., Colo. Rev. Stat. Ann., Sec. 18-4-401(1)(a). In order to satisfy its *Wright Line* burden in this case, therefore, the Respondent had to establish, at a minimum, that at the time it discharged Ostler, it had a reasonable belief that she committed theft, i.e., that she knowingly took bartender base wages without the Respondent's authorization, or by deception, during those times that she worked as a waitress.

With respect to whether the Respondent has established a reasonable belief that Ostler engaged in "theft," we note that Ostler engaged in no deception; after November 17 and through the date of her discharge, she routinely and openly clocked in for work without overriding her computerized default job code of bartender by affirmatively clocking in instead under the waitress code. And at no time after November 17 through the date of Ostler's discharge did the Respondent notify her that she was not authorized to continue to do that.⁸ In any event, Wenschlag terminated Ostler based only on Moon's report to Wenschlag immediately after Moon discovered the discrepancy in Ostler's pay. The Respondent conducted no investigation of the discrepancy, nor did it give Ostler an opportunity to explain it, before peremptorily terminating Ostler for theft.

Not only does the Respondent's failure to conduct a fair investigation and its failure to give Ostler an opportunity to explain her actions before imposing discipline defeat its claim of reasonable belief that Ostler was engaged in theft, *McKesson Drug*, supra, at 936–937 (Hammond's suspension), these failures are also significant factors in support of finding that the Respondent did not act on such a belief in discharging her. These findings, in turn, lead us to conclude that the discipline was discriminatorily motivated. *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997).

While our dissenting colleague sees this case differently, his perception is somewhat colored by remarks made by Ostler after she was discriminatorily terminated. during stressful postdischarge meetings she had with groups of management officials. None of what transpired in those meetings had any bearing on the Respondent's decision to terminate Ostler, for the simple reason that Ostler had already been terminated before the meetings. Our colleague is incorrect in characterizing these postdischarge meetings with Ostler as the Respondent's investigation preceding its final decision to terminate Ostler. Ostler was terminated in a telephone call from Food and Beverage Manager Pratt on February 13, acting on orders from General Manager Wenschlag that were issued shortly after Moon reported Ostler's timeclock discrepancy to Wenschlag. There was no pretermination investigation or request to Ostler that she explain the discrepancy. She was not suspended pending an investigation. She was not conditionally discharged. She was simply terminated, then and there. Her dis-

⁸ The cases cited by our colleague, *Merrilat Industries*, 307 NLRB 1301 (1992); and *Greenery Extended Care Center in Cheshire*, 322 NLRB 932 (1997), are thus fundamentally different from the instant case in that those cases involved employees who, unlike Ostler, knowingly and deceptively took employer property.

charge was nothing less than final at the time Pratt notified her of it. Ostler's remarks to management referred to by our colleague took place after the Respondent terminated her on February 13, and thus had no possible effect on the Respondent's decision to terminate her in the first place. The Respondent's failed *Wright Line* defense to the allegation of unlawful termination is not salvaged by remarks that Ostler made to the Respondent after the termination.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Midnight Rose Hotel & Casino, Inc., Cripple Creek, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER SCHAUMBER, dissenting.

Introduction

The Supreme Court has instructed that an employee who is reasonably believed to have been engaged in misconduct must not be put in a worse position because he or she engaged in protected conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284–285 (1977). The Court has also cautioned, however, that in applying a rule of causation, an employee must not be put in a better position than the employee would have been in if the employee had not engaged in the protected conduct. Id. at 285–286. Because I believe by adopting the judge's decision that the Respondent violated Section 8(a)(3) when it discharged Maureen Ostler for theft, my colleagues do the latter, I respectfully dissent.²

Employee theft has a corrosive effect on the employee and a deleterious impact on the employment relationship. It is not surprising, therefore, that theft, regardless of the amount involved, is the "most universally recognized ground for summary discharge." It is also not surprising that the Respondent, the operator of three casinos, including the Midnight Rose where Ostler was employed,

¹ The Board quoted the Supreme Court's admonition in formulating its *Wright Line* test. *Wright Line*, 251 NLRB 1083, 1086 (1980) (quoting *Mt. Healthy*, supra, 429 U.S. at 285–286), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

has a policy of terminating employees for theft. It was pursuant to that policy that Ostler was terminated.

In concluding that Ostler made an "honest mistake" based on an explanation she gave many months later for the first time at the hearing, the judge selected certain evidence, ignoring the most persuasive, and improperly substituted his own business judgment, second-guessing that of the Respondent. The judge's reliance, for example, on what he considered as a "virtually meaningless" pay rate differential is inconsistent with extant Board law; it is also not relevant. Finally, notwithstanding the judge's and my colleagues' findings to the contrary, the record does not support the conclusion that the Respondent engaged in disparate treatment when it terminated Ostler.

Facts

The essential facts are not in dispute. The Respondent discharged Maureen Ostler, a bartender, citing theft by misuse of the timeclock as the reason for discharge. Ostler and April Hendricks, a cocktail waitress, had temporarily switched positions with the permission of their supervisor, Shelby Moon. When Moon conducted a periodic payroll audit upon her return from vacation, she discovered that Ostler had been overpaid at the bartender rate during 47 shifts (over the course of approximately 3 months) that she worked as a cocktail waitress. Ostler had failed to use the separate cocktail code when she clocked in during these shifts.

The evidence demonstrates that Ostler knew perfectly well how to clock in using the cocktail code. Although the judge apparently did not believe Moon's testimony that she instructed Ostler and Hendricks to use the proper code, it is clear that Ostler knew how to clock in. In fact, she clocked in using the cocktail code during her first shift as a cocktail waitress, but she failed to do so thereafter. Ostler's own testimony reveals that instructions on clock-in procedure are posted near the timeclock, and employees receive training on this procedure at the beginning of their employment. Indeed, Ostler demonstrated the proper clock-in procedure to the Respondent's chief financial officer Scott Rhoda and marketing director Bob Taylor during the discharge investigation.

The Respondent conducted an investigation that spanned several days before making a final decision to terminate Ostler. As soon as Moon discovered the payroll discrepancies, she reported them to General Manager Richard Wenschlag. Moon and Wenschlag reviewed the payroll records, discussed prior terminations for theft, and determined that, consistent with the casino's past practice, Ostler should be terminated for theft. Thereafter, several meetings occurred between Ostler and management representatives regarding Ostler's discharge.

² In the absence of exceptions, I adopt the judge's findings of 8(a)(1) violations. Similarly, the Respondent did not specifically except to the judge's finding that the General Counsel met the initial burden under *Wright Line*, supra. Rather, in its exceptions, the Respondent focuses on its rebuttal of the General Counsel's evidence. Therefore, I will only address this issue.

³ Labor Agreement in Negotiation and Arbitration, Zack and Bloch, "The Cardinal Offenses" at 147. (BNA 1983.)

During the course of these meetings, Ostler did not deny her actions. During the first meeting, Rhoda asked Ostler if she knew she was being overpaid, and Ostler said she did. As noted above, she also demonstrated the correct clock-in procedure upon request. During a meeting 2 days later, Wenschlag asked Ostler if she would have reported to management if she had been underpaid, and Ostler said yes. Wenschlag and Rhoda decided to think about the termination over the weekend. Wenschlag testified that because Ostler complained that her termination was union-related, he and Moon thought "longer and harder to make sure [they] were doing the right thing." After considering the matter further, Wenschlag called Ostler on Monday and told her she was terminated because the Employer could not set a different precedent.

During the hearing, Ostler claimed for the first time that she made a mistake. She testified that she assumed that once she clocked in under one department (i.e. cocktail), the timeclock would retain that designation. On cross-examination, she admitted that, during the meetings conducted by management to consider her termination, she never gave this mistaken assumption as the reason she accepted salary overpayments for 47 work shifts covering a period of nearly 3 months.

As mentioned above, the Respondent maintains a policy of terminating employees who engage in theft. In the past, it discharged two employees who left work while on the clock to gamble at other casinos. The Respondent had also discharged an employee who worked an unauthorized extra shift every week. The Respondent suspended an employee for the one-time offense of using its toll-free telephone number to receive a long-distance personal call at her home.

Analysis

Introduction

The sole issue in this case is whether the Respondent met its rebuttal burden of proving that it would have discharged Ostler in the absence of her protected activity. Wright Line, supra. My colleagues agree with the judge's finding "that the Respondent's accusation of theft by misuse of the timeclock was pretext for its unlawful motive." Respectfully, in my view, such a conclusion involves substituting the judge's, and now the Board's, judgment for the legitimate business judgment of the Employer. It also impermissibly puts Ostler in a better position than she would have been in had she not engaged in protected activity. See Mt. Healthy School District Board of Education v. Doyle, supra.

I. THE EVIDENCE SUPPORTS THE RESPONDENT'S REASONABLE BELIEF THAT OSTLER WAS ENGAGED

IN MISCONDUCT AND THAT THE RESPONDENT ACTED ON THAT BELIEF

While, I believe, the more accurate weighing of the evidence establishes that Ostler committed the offense for which she was terminated, that is not the Respondent's burden to prove. An employer need only show "that it had a reasonable belief that the employee committed the offense, and that it acted on that belief." *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002). The record evidence here amply supports that showing.

Ostler conceded that she knew she was being overpaid but made no effort to correct the situation. Although she said that if she had been underpaid she would have brought the matter to management's attention, she was unable to explain why she did not bring to management's attention the overpayments made for each of 47 shifts spanning a period of nearly 3 months. Further, when asked to demonstrate the clocking-in procedure, she did so properly, consistent with the instructions management provided employees next to the timeclock machine.

Ostler's claim that she mistakenly assumed that the timeclock machine would maintain the last entered code until it was changed and that it would not default to her general job classification—the higher-paying bartender job—was made for the first time at the hearing. The late arrival of this defense is reason enough to discount it. However, other evidence undermines the veracity of Ostler's claim without regard to its belated arrival.

In addition to the evidence described above, Ostler transferred back and forth between cocktail waitress and bartender *several times* during this 3-month period, but she never changed her job code after overriding it the first time to reflect that she was working her first cocktail waitress shift. If Ostler assumed the machine would retain the last-entered job classification, cocktail waitress, however, why would she fail to override the machine again to reflect when she was working the higher-paid bartender position?

Contrary to my colleagues, I believe the above evidence amply supports the Respondent's reasonable belief that Ostler knowingly accepted wage overpayments. It also supports the Respondent's characterization of such actions as theft, pursuant to my colleagues' definition, "knowingly obtaining [by cashing improperly inflated paychecks] something of value [approximately \$470 worth of unearned wages] from someone else [the Respondent] without authorization." The Respondent did not raise Ostler's wage rate or otherwise authorize her to accept overpayment of wages to which she was not entitled, for a job that she did not perform. No one claims that Ostler covertly or deceptively shielded her job code

when clocking in or that the Respondent was obligated to look over her shoulder to make sure that she clocked in honestly each time. I disagree with my colleagues' assertion that the Respondent was obligated to notify Ostler that she was not authorized to continue clocking in improperly before it could conclude that she knowingly obtained wage overpayments without authorization. Professional service personnel do not need to be told that they are not authorized to secure and keep wage overpayments anymore than they need to be instructed not to overcharge their patrons and pocket the difference. Here, the Respondent trained its employees on clock in procedures and posted the instructions next to the timeclock. Ostler knew her wage rate and was attentive enough to her paychecks to assert that she would have brought any disadvantageous discrepancies to her employer's attention. Respondent's actions to enforce its policies violated no Federal law.

The judge's conclusion that the above evidence does "not eliminate the likelihood of an honest mistake," even if factually accurate, significantly misconstrues the nature of the Respondent's burden. See *McKesson Drug Co.*, supra, 337 NLRB at 937 fn. 7. More significantly, since the Respondent was unaware of Ostler's mistaken assumption explanation at the time it discharged her, this defense cannot fairly be relied on in evaluating the reasonableness of the Respondent's belief or its motivation for terminating Ostler.

The judge's penchant for second-guessing the Respondent's business decisions and management practices is evident in his findings with regard to Moon's testimony that she "admonished both Ostler and Hendricks to punch-in under the proper job codes." The judge said that he was "not convinced" that Moon should be credited because of her antiunion activities. Consequently, he found in the alternative that if, in fact, Moon admonished Ostler and Hendricks, her admonishment led to misunderstandings and confusion, which the posted instructions did not override. According to the judge, "Ostler is being held responsible for what is essentially a management shortcoming." Moon, the judge says, "should have been more clear," she "should have tracked the two employees' compliance," and "a simple question from Moon would have sufficed and the error easily . . . corrected." He concludes: "Certainly Moon should have noticed the incorrect payments earlier." While the judge, if he had been a member of management, may have given what he believed were clearer instructions without relying on management's posted instructions, may have followed up with the two employees and asked them questions about their clocking in procedure instead of relying on the employees to ask management if they had

any questions with regard to its instructions, and may have conducted a payroll audit more often than the Respondent who appears to do so quarterly, it is not the role of the judge or the Board to question managerial practices and decisions unless they are being used for discriminatory purposes in violation of the Act. While I do not wish to suggest or leave the impression that I share the judge's view of management's shortcoming or the propriety of his observations, the Act "does not require that an employer act wisely, or even reasonably; only, whether reasonable or unreasonable, that it not act discriminatorily." *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976).

Nor am I persuaded by the judge's explanation for Ostler's failure to explain her "honest mistake" defense to her employer, that "she was operating in an emotional state" during the discharge meetings. Even assuming that Ostler's emotion at the first meeting justified her failure to mention such a salient aspect of her defense, she had ample time to collect her thoughts and assert her explanation of mistake at the following meeting 2 days later. She failed to do so, however.

My colleagues' and the judge's reliance on the pay differential's relative impact on Ostler's total earnings as supporting Ostler's "honest mistake" defense is inconsistent with extant Board law, and, once again, intrudes on a management prerogative. The Board has repeatedly vindicated an employer's concern about employee theft, no matter how negligible the amount in question. See, e.g., Merillat Industries, 307 NLRB 1301, 1303 (1992) (theft of sandpaper of "miniscule" value, less than \$2); Greenery Extended Care Center in Cheshire, 322 NLRB 932, 938 (1997) (removal of Christmas tree from facility without proper permission). Also, while the judge may view the amount involved as "meaningless," that is not a determination for the judge to make, nor, in my view, is it correct. Regardless of how much money Ostler received from tips, \$10 per shift over the course of 47 shifts amounts to \$470, or nearly \$1900 if left unremedied for a year.

II. THE RESPONDENT CONDUCTED AN ADEQUATE INVESTIGATION

My colleagues take the position that Ostler's discharge occurred before the termination meetings and that the Respondent failed to conduct an adequate investigation before terminating Ostler. I disagree. While it is true that Ostler was informed of the decision to discharge her before she met with management, the record makes clear that the Respondent's managers agreed to reconsider their discharge decision when Ostler took issue with it. The Respondent reaffirmed Ostler's discharge the following week, but only after meeting with Ostler several

times and re-evaluating its initial decision. Had the termination been irreversible prior to the meetings with Ostler, there would have been no point in meeting with her and continuing the investigation for several days. Thus, the post-meeting reaffirmation of Ostler's discharge was the final decision.

Moreover, I do not agree with my colleagues that the Respondent failed to conduct an adequate investigation, supporting their finding of pretext. Moon conducted a payroll audit, which revealed unequivocal evidence that Ostler received \$10 more per shift than she was entitled. She also noticed that job code change entries were missing from the computerized timeclock record for Ostler, resulting in her being paid consistent with her default bartender job category. Moon discovered that, despite 3 months' worth of paychecks reflecting payment at the higher bartender wage rate, Ostler never reported the discrepancy to management. Wenschlag and Moon reviewed the payroll and timeclock records. Obviously aware that the procedures for proper use of the timeclock had been communicated to Ostler, they discussed the overpayments and compared what happened here with prior discipline imposed on employees for theft. Based on this information, they decided to terminate Ostler.

It is unnecessary to decide whether, without the Respondent's managers speaking with Ostler, this initial investigation was adequate or evidence of a rush-to-judgment and of pretext.⁴ Once Ostler told the Respondent that she disputed management's decision, several of the Respondent's managers gave Ostler ample opportunity to explain her actions, after which they reconsidered their decision.

III. THE RESPONDENT DID NOT ENGAGE IN DISPARATE TREATMENT BY TERMINATING OSTLER FOR THEFT

The record does not support the judge's, and my colleagues' conclusion that the Respondent is guilty of disparate treatment by terminating Ostler for theft. Ostler's knowing receipt of overpayments spanning a 3-month period of time is just as serious as previous employees' acts of gambling while on the clock or working unauthorized shifts, if not more serious. In fact, the offenses are similar in that they all involve misuse of the time-clock.

The judge addressed the circumstances surrounding prior instances of misconduct in analyzing the Respondent's *Wright Line* rebuttal argument, finding that those

situations "are of no assistance here." I disagree with the judge as well as my colleagues. The Respondent's comparison of Ostler's behavior to prior instances of misconduct involving misuse of the timeclock was reasonable, and its attempt to treat more or less similarly situated employees in an even-handed fashion is not rendered discriminatory because the circumstances are not exactly the same. As the Board has repeatedly pointed out, "it is rare to find cases of previous discipline that are 'on all fours' with the case in question," and the absence of such evidence is "not to be viewed as fatal to [a] [r]espondent['s claim]." Merillat Industries, supra, 307 NLRB at 1303. In this regard, Ostler's timeclock offense is sufficiently dissimilar to another employee's one-time misuse of the Respondent's toll-free telephone number to justify the variation in punishment for the two offenses.

Thus, because the Respondent introduced ample evidence of similar treatment, and it adequately explained why it distinguished Ostler's misconduct from a truly minor offense for which it gave a lesser discipline, the Board should accept the Respondent's discipline as a legitimate business decision without second-guessing the Respondent's assessment of the appropriate penalty. See *Paramount Metal & Finishing Co.*, supra..

In sum, since the Respondent established by a preponderance of the evidence that it would have terminated Ostler for theft even in the absence of her protected concerted activity, I find that the decision to discharge Ostler was lawful and respectfully dissent from my colleagues' conclusion to the contrary.

Michael Cooperman, for the General Counsel.

Jeffrey T. Johnson, Esq. (Holland & Hart), of Denver, Colorado, for Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Denver, Colorado, on June 18–19, 2002, ¹ based on a complaint issued on April 16 by the Regional Director for Region 27. The underlying unfair labor practice charge was filed by Teamsters Local Union No. 537 (the Union) on February 28. The complaint alleges that Midnight Rose Hotel & Casino (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act.

Issues

The case presents two questions. The first is whether Respondent engaged in a prohibited response to union organizing, such as coercively interrogating employees, soliciting information from employees about the organizing activities of other employees, threatening to discharge employees because of their organizing activities and telling them that union representation

⁴ In any event, it is simply not the Board's province to dictate appropriate methodologies for workplace investigations. Only where the record evidence reflects a demonstrable departure from prior standards for investigations of similar misconduct or a sham investigation is an inference of animus warranted.

¹ All dates are 2002 unless stated otherwise.

is futile. All are alleged to be independent violations of Section 8(a)(1) of the Act. Second, the General Counsel asserts that Respondent violated Section 8(a)(3) of the Act by discharging its employee Maureen Ostler for engaging in union organizing. Respondent claims Ostler was fired for a nondiscriminatory reason, theft from the Company by misuse of the timeclock.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the operation of a hotel and casino in Cripple Creek, Colorado. In the course and conduct of its business, Respondent's annual gross revenue exceeds \$500,000 and it annually purchases goods, materials, and services in excess of \$5000 originating from sources outside Colorado. Accordingly, Respondent admits, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates three casinos in Cripple Creek, the Midnight Rose involved here, J.P. McGill's, and the Brass Ass. Other companies operate additional casinos in the town, including one known as the Double Eagle.

During early 2002, the following people were members of Respondent's management: Richard Wenschlag, the general manager; Scott Rhoda, the chief financial officer; Dave Schneider, the director of operations; Eric Chandler, the assistant director of operations; Shelby Moon, a shift/bar manager; Rebecca Vandiver, a supervisor; Bob Taylor, the marketing director; and Rick Pratt, the food and beverage manager.

In January 2002, Local 537's organizer Dean Modecker began working with Respondent's employees, Patricia "Pat" Donch and Maureen "Mo" Ostler, to organize Respondent's facility. This was the Union's third effort, having failed in 1998 and 2001. Donch, a blackjack dealer and one of the lead organizers in past campaigns, initiated the most recent attempt with a call to Modecker in late December 2001, telling him the employees were ready to try another campaign. Maureen Ostler became involved due to Donch's recommendation. On January 16, 2002, Modecker sent Wenschlag a letter notifying Respondent that the Union was beginning another organizing drive, and advising that Donch was the employee leading the effort

On February 12, 2002, Respondent closed the blackjack pit. Donch was laid off together with the rest of the blackjack dealers. That layoff is not a part of this complaint. Ostler was terminated the following day, assertedly for the timeclock violation. With both Donch and Ostler gone, the organizing attempt was effectively ended.

Ostler's alleged timeclock problem began when she and fellow-employee, April Hendricks, decided to swap positions. In mid-November 2001, Hendricks approached Ostler with the idea of temporarily exchanging positions whenever they worked the same shift. At that time, Ostler was a bartender and Hendricks a cocktail waitress. They spoke with their Shift

Supervisor Shelby Moon (now Shelby Brenuich) about the switch. Moon was initially reluctant but later agreed. Beginning with a common shift on November 17, 2001, Ostler began cocktailing and Hendricks began bartending, mostly on Fridays and Saturdays. When their shifts did not match, each usually performed her original job. Several months later, in mid-February 2002, Food and Beverage Manager Rick Pratt called Ostler at home to tell her she was being fired for a timeclock violation. Moon had discovered that Ostler had been receiving a bartender's hourly rate during the shifts she was serving as a cocktail waitress. This meant Ostler was being overpaid by \$1.25 an hour for those shifts. Respondent characterized this transgression as theft.

B. Interference, Restraint, and Coercion

Even before Modecker's letter, Respondent had become concerned that union-organizing activity was about to commence at its facility. Wenschlag had witnessed picketing by another union at the Double Eagle. After the letter, various sources alerted him to organizing activities within Respondent itself.

1. Rebecca Vandiver

While soliciting supporters for the organizing campaign, Ostler spoke with fellow bartender Trent Costello. Costello testified that during their conversation, Ostler advocated for the Union and asked for his support. Undecided about union representation, Costello conferred with his live-in girlfriend and fellow employee, blackjack dealer Brenda Franco, about Ostler's effort. Franco in turn told her good friend, supervisor Rebecca Vandiver that someone had approached Costello about supporting the Union. Vandiver contacted Franco the next day and asked for the individual's name. Franco identified Ostler.

Franco testified that she spoke with Vandiver about the Union because she genuinely wished to hear her friend's opinion. Vandiver, being both a member of management and personally very antiunion, attempted to dissuade Franco from union activity. She advised Franco to stay out of the union fray, calling the previous campaign a "nightmare," and admonishing her not to talk to anyone about it. Vandiver also told Ostler if there was organizing, Wenschlag would likely close the blackjack pit and that people had been laid off during the last campaign.

Costello testified that Vandiver once approached him for information about the Union. He responded by telling her he did not know anything about it. Vandiver denied that she ever asked Costello about the Union.

2.Shelby Moon

Randi Carroll was a blackjack dealer until the blackjack pit was closed. While working for Respondent, her supervisor was Shelby Moon. Carroll and Moon had a good working relationship. They considered themselves friends but were not so close as to associate outside of work. Carroll testified that Moon, having first extracted a promise of confidentiality, asked her whether she had witnessed any union activity in her area.

² Vandiver: "And I just basically told her to stay away from the Union, that the last time was a nightmare, that they followed us, and it wasn't fun at all, and just to stay away from it."

Moon expressed surprise when Carroll said she had been aware of union activity for about 3 months and that she supported the cause. Moon admitted she was "shocked" to learn of Carroll's prounion attitude.

Like Vandiver, in addition to seeking information regarding organizing activities, Moon went on to express her personal antiunion sentiments to Carroll. Carroll said Moon explained that she and her father had a sufficiently strong disagreement about the issue to the point where they had agreed not to discuss it. Moon and Carroll discussed the organizing at the Double Eagle casino, where a different union had recently been observed picketing. They then focused on what organizing the Midnight Rose might mean to them.

Carroll recalled that during their discussion Moon brought up the name of Sabrina Newberry, one of Respondent's former employees. She said Moon used Newberry's name as an example of someone with strong prounion beliefs and who had suffered negative consequences because of them, yet being careful not to say too much to Carroll. Carroll testified that at the time of the conversation with Moon she suspected but was uncertain that Newberry had been terminated, for Moon did not go that far. Moon agreed that, as far as she was aware, Newberry had been terminated for her "pro-union passions."

Former Shift Manager Michael Martinez testified that in January he heard a rumor that Ostler was organizing for the Union. Shortly thereafter, he says, he and Moon had occasion to be walking by the bar. Moon observed to him that Ostler seemed to be spending a lot of time at the end of the bar conversing with many employees. Moon told him she thought that might be a sign that Ostler actually was acting as an organizer. In addition, Martinez testified that Wenschlag was constantly on the lookout for union organizers and had given standing instructions to the managers to report any suspicions they had.⁴

3. Richard Wenschlag

On the stand, Respondent's general manager, Richard Wenschlag, made the assertion that he dismissed the report of Ostler's organizing activities as rumor.⁵ Yet, his activities belie

the contention. During the previous union campaigns, black-jack dealer Mark Shibe had shown himself to be strongly antiunion. In January or February, Wenschlag called Shibe at home. Managers Scott Rhoda and David Schneider were present in Wenschlag's office to listen on the speakerphone. Wenschlag asked Shibe if he was aware of any organizing at the casino. Shibe answered that he had not heard anything at that time. Wenschlag then asked Shibe to report back if he observed any union activity, specifically requesting Shibe attempt to engage Ostler in a conversation about the Union, a transparent effort to confirm the rumor. Shibe testified he did try to speak with Ostler about the Union. However, as Shibe had predicted during the call, Ostler did not mention the Union to him during the discussion. Shibe attributed Ostler's silence to his well-known opposition to union representation.

C. Maureen Ostler's Discharge

At the center of the 8(a)(3) controversy is whether Ostler was terminated for timeclock abuse or because of her support for the Union. As described above, Respondent became aware of Ostler's organizing via a number of sources and, indeed, Wenschlag had settled on her as a union activist. Nonetheless, Ostler seemingly committed some work-related deceit. She was discovered as being overpaid under what might be characterized as questionable circumstances. Respondent maintains that it fired her for timeclock abuse, not for her union activity.

Immediately upon returning from vacation in February 2002, Moon performed a periodic "payroll audit." As a result of the review, Moon discovered Ostler was being overpaid. The error had not previously been caught during Moon's weekly "time checks" for punch-in and punch-out accuracy. During the audit, Moon noticed job code change entries were missing from the computerized timeclock record. Each employee has a default job category for timeclock purposes. If an employee serves in a different capacity, he or she is to change the default category to show each change. The missing codes next to Ostler's name indicated that her pay was being assessed under her default category. This caught Moon's attention because she knew Ostler had gone back and forth between bartender and cocktail waitress. Ostler's punch-in records should have shown the cocktail code for the shifts she was working as a cocktail waitress and her bartender code when she switched back. Moon testified that when she gave permission for the job switching, she admonished both Hendricks and Ostler to punch in under the proper category.

Moon immediately discussed Ostler's payroll discrepancy with Wenschlag. After conferring, they agreed Ostler had committed a terminable offense and he decided to discharge her. Pratt, the food and beverage manager, called Ostler at home and told her she was being terminated for theft. Offended that she had been accused of theft (and unclear what had led to such a charge), Ostler went to the casino to pick up her last check and to speak with Mark Lockwood, the human resources director. During the course of their discussion, Rhoda,

³ Q. (BY Mr. COOPERMAN) Well, didn't you talk about Sabrina Newberry?

A. (WITNESS MOON) Yes. Her name did come up.

Q. That was the one person that was brought up by name in that conversation; isn't that correct?

A. Correct.

Q. And that was the person who you brought up because her prounion passion had caused trouble, didn't it?

A. Yes.

Q. And, in fact, she lost her job because of those pro-union passions, correct?

A. As far as I'm aware. I was not a manager at that time.

Q. And as far as you're aware, that's correct?

A. Yes.

Q. And isn't it true you brought her name up to demonstrate what the union coming around again could cause?

A. No.

⁴ Respondent discounts Martinez' testimony as that of a disgruntled discharged former employee. Assuming that he is disgruntled, I do not find his attitude to have severely undermined his credibility.

⁵ (By Mr. Johnson) Q. What was your reaction to that news? (WITNESS WENSCHLAG)

A. Rumor.

Q. Was it something that was of concern to you?

A. No.

Taylor, Pratt, and "Lissa" from payroll joined Lockwood and Ostler. Throughout the meeting Ostler was upset and tearful, fiercely denying that she had stolen anything.

At the hearing, it was the General Counsel's contention that Ostler simply made an error in operating the computer which serves as the timeclock. Ostler testified that she believed the machine would maintain the last entered code until it was changed again. She did not think the machine would default to her general job classification—the higher-paying bartender job. The payroll records show that she did indeed change her job category on November 17, 2001, the first day she switched positions with Hendricks. Respondent's witnesses claim Ostler never offered this default code defense during the course of two termination meetings. In fact, at management's request, Ostler successfully demonstrated the proper punch-in procedure.

During a break in the initial termination meeting, Ostler told Rhoda that she "knew this [termination was] union related." During a second termination meeting, at which Rhoda, Wenschlag, and Ostler were present, she again voiced her suspicion that she was being fired for union activity. Wenschlag denied it and on the stand stated that because Ostler had brought up the Union they thought "longer and harder to make sure [they] were doing the right thing."

III. ANALYSIS AND CONCLUSIONS

A. The 8(a)(1) Allegations

In responding to a union organizing campaign, an employer is entitled to undertake countermeasures only to the point of illegality. The Board and the courts have said that Sections 8(a)(1) and 8(c),⁶ when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969). See also *El Rancho Market*, 235 NLRB 468, 471 (1978). As stated there, the Board, in determining whether the conduct under scrutiny is coercive within the meaning of Section 8(a)(1) looks to see whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act.

Here, Respondent did not stay within those confines. Rather, in its resistance to unionization, it engaged in a number of 8(a)(1) unfair labor practices. Acting through Vandiver, Moon, and Wenschlag, Respondent conducted several illegal interrogations, threatened employees, and solicited an employee to spy on another. Counsel for the General Counsel asserts that the facts also support a finding that Respondent, through Vandiver told employees that their effort to obtain union representation would be a futile undertaking, violating Section 8(a)(1). I find the evidence insufficient to sustain that allegation.

The conversations between Vandiver and Franco are largely uncontroverted. In her testimony, Vandiver did not dispute the fact that she emphatically warned Franco against joining the Union, saying the last time had been a 'nightmare' and that the organizers had followed them, implying that such a thing was alarming. Nor did Vandiver dispute asking Franco for the name of the union organizer and uncovering Ostler in the process.

It is true that these discussions took place between friends. However, Vandiver is an admitted supervisor. It was not her place to coerce her friend Franco from union activity. Franco was free to make up her own mind uninhibited by restraints imposed by Vandiver's meddling. Friendship does not privilege interference, restraint, and coercion aimed at denying the right to engage in conduct protected by Section 7.

There is some dispute regarding the threats which took place during the Franco-Vandiver discussions. Franco testified that Vandiver claimed Wenschlag would close down the blackjack pit if he suspected organizing and had laid employees off during the last organizing drive. Vandiver denied both. I find Franco's versions of these conversations to be the more credible. At that time she testified, Franco was no longer an employee of Respondent. She had left her employment somewhat voluntarily, choosing to not take the position offered to her after the blackjack pit closed. She has no obvious ax to grind with Respondent. The fact that Franco testified in a fashion contrary to that of her good friend also adds weight to her credibility. Vandiver, on the other hand, still works as a manager for Respondent and can only gain from a memory lapse regarding some of her comments. Accordingly, based on both demeanor and logic. I find Vandiver made the threats as alleged and that they violated Section 8(a)(1).

Vandiver also testified that she did not recall ever having asked Franco's boyfriend, Trent Costello, if he knew anything about the Union. Costello testified that while visiting Franco at the home they shared, "Becca [Vandiver] asked me if I knew anything about the Union." He told her that he did not.

I find Vandiver's denial not to be as credible as Costello's testimony. She continues to have the same employment-related motivation for a memory lapse discussed above. Costello, however, was still an employee of Respondent at the time of the hearing. He was subject to both the social implications (Franco's friendship with Vandiver) and employment consequences. The fact that he is still employed and gave testimony unfavorable to his employer is a significant factor in assessing his credibility and I credit him over Vandiver. Georgia Rug Mill, 131 NLRB 1304, 1305 fn. 2 (1961), modified on other grounds 308 F.2d 89 (5th Cir. 1962); Shop-Rite Supermarket, 231 NLRB 500 (1977); Eagle Transport, 338 NLRB 489 (2002). Vandiver had no legitimate purpose to interrogate Costello about his knowledge of the Union. Her only aim was to find out about the employees' union activity, no doubt with an eye to reporting it to higher management. Accordingly it violated Section 8(a)(1).

However, I do not discern from Vandiver's conduct that she did or said anything which qualifies as discouraging employees from union activity as a futile act. At best she tried to coerce employees through threats and a contention that union organizing was a negative experience. She never said anything to the

⁶ Sec.8(c), generally known as the "free speech" section of the Act says with regard to an employer's response: "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

effect that it was a waste of energy or that Respondent would never recognize or bargain with a properly recognized labor organization. Compare her conduct to that of the employer in Wellstream Corp., 313 NLRB 698, 706 (1994). There, the employer told its employees that "no son of a bitch would ever bring a union in" and the company would never be unionized. Similarly, see *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989), where the employer said he would fight unionization "til his last penny" and the company would always be nonunion. Both cases involved a company principal who had the power to formulate such a policy. Vandiver, a first line supervisor, clearly is not a principal and lacks such power. And, both employers expressed an intensity and purpose which Vandiver did not display. This case is more akin to Ready-Mix, Inc., 337 NLRB 1189 (2002), where a company principal simply said that the company was nonunion and had no plans to become unionized. Therefore, I shall dismiss paragraph 5(c)(ii) of the complaint relating to the futility issue.

There is no real dispute regarding Moon's questions and comments to Carroll. Having first asked for a promise of confidentiality, Moon proceeded to ask Carroll about her union activities, simultaneously going out of her way to express her personal antiunion beliefs. Obviously, Moon's reference to former employee Sabrina Newberry was a not-so-thinly-veiled threat of job loss. In her testimony, Moon conceded that she believed Newberry had been fired for her union activity. There can be no doubt that she intended her remark to convey that likelihood. And, Carroll got the message, for she testified that she concluded from Moon's remarks that Newberry's organizing had led to her dismissal. Moon's interrogation and threats were intended to coerce Carroll from exercising any right granted by Section 7. Both the interrogation and the threats violated Section 8(a)(1).

Finally, there is the phone conversation between Wenschlag and Shibe. Wenschlag admitted he called Shibe to ask him whether he had witnessed any union activity. That alone con-However, Shibe says stitutes an unlawful interrogation. Wenschlag went well beyond that inquiry and recruited him as a spy for management and asked him to elicit information from Ostler about her union activity and report his findings back to Wenschlag. It is that part of the conversation which is in dispute, for Wenschlag denies making any reference to Ostler. I find Shibe's version of the conversation is far more credible than Wenschlag's denial. Shibe simply had no motivation to fabricate his story. His antiunion feelings have not changed, but they did not overcome what he knew to be the truth. Wenschlag, on the other hand, had every reason to deny having made the request. Shibe's version is credited. Furthermore, as seen below, Wenschlag's credibility is rejected on other matters as well. I conclude Wenschlag violated Section 8(a)(1) by interrogating Shibe regarding the union activities of other employees and recruiting him to spy on Ostler's union activities.

B. Ostler's Discharge

The leading case in assessing an 8(a)(3) discharge allegation is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Its doctrine was later approved by the Supreme Court in *NLRB v. Transporta*

tion Management Corp., 462 U.S. 393 (1983). In Wright Line the Board laid out the burdening-shifting components of an 8(a)(3) case. Yet the doctrine's essence only requires the General Counsel to prove by a preponderance of the evidence that union animus was 'a motivating factor' in the termination decision. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999). To do that, the General Counsel must prove several elements. They are: (1) there must have been, or perceived to have been, union activity by the discriminatee; (2) the employer must have knowledge of the discriminatee's union activity; (3) the employer must be shown to harbor animus or hostility toward employee union activity; and (4) there must be a nexus of those elements to the discharge, usually timing. Here, I find, under Wright Line, that the General Counsel has met the burden of establishing a prima facie case and that union organizing was 'a motivating factor' in Wenschlag's decision to discharge Ostler.

Certainly there were organizing activities occurring at Respondent's facility at a time closely connected to Ostler's termination. It is uncontroverted that approximately a month before Ostler's termination, Wenschlag received a letter from union organizer Modecker announcing the Union's intent to organize Respondent's facility. In addition, witness Carroll testified she knew it and had said as much to Moon during a conversation. Costello testified that Ostler had spoken to him about the benefits of unionization and Vandiver learned about that from Franco.

In its brief, Respondent argues there is little evidence to show Respondent had knowledge of Ostler's organizing activities. It claims the only information management had regarding Ostler's union organizing was through the conversation between Franco and Vandiver but that it was so attenuated and vague as to be meaningless. Yet, I find this assertion ignores Shibe's credible account of his phone conversation with Wenschlag. One can reasonably conclude from that incident that Wenschlag was hunting for employee organizers and had targeted Ostler. There is also the testimony of Martinez, Respondent's former shift manager. He specifically recalls Moon voicing her suspicions about Ostler. Clearly the information Franco gave to Vandiver is not nearly as attenuated or insignificant as the Respondent would have it seem. These are three clear and likely paths directly to uppermanagement about Ostler's involvement with the Union. In any event Respondent is charged with their knowledge. See Ready Mixed Concrete Co., 317 NLRB 1140, 1143-1144 (1995); Van Dyke Crotty Co., 297 NLRB 899 fn. 4 (1990); Dr. Phillip Megdal, D.D.S., Inc., 267 NLRB 82 (1983); and Pellegrini Bros. Wines, 239 NLRB 1220 (1979).

Moreover, Respondent's union animus is clearly found through the 8(a)(1) violations discussed above. Also, as the Wenschlag-Shibe telephone conversation amply illustrates, there was animus, in the form of interrogation and surveillance, specifically targeting Ostler. The General Counsel has easily established a prima facie case concerning Ostler's discharge.

Given the General Counsel's prima facie case, *Wright Line* shifts the burden to Respondent to rebut it. To do so, it must prove that the employee would have been terminated in any case. That is to say, Respondent must prove, even absent Os-

tler's protected conduct, that her timeclock failings would have resulted in her termination.

Respondent argues Ostler behaved in a dishonest manner through her supposed misuse of the timeclock and that she committed theft by knowingly accepting wage overpayments. To emphasize its contention that the higher wage was not the result of mistake, Respondent argues that Ostler was well-versed in the timeclock procedures. Also, Respondent notes Moon's testimony that she told Ostler to change her timeclock job codes whenever a switch was made, and that, in any case, directions for the timeclock code changes were posted.

I do not find Respondent's rationale for Ostler's termination persuasive. A careful scrutiny of the facts undercuts Respondent's claim that Ostler's knowledge of the proper timeclock procedures makes her intent to steal evident.

First, I find it relevant that Ostler's actions are not in conflict with her expressed reasoning. She testified that she believed the timeclock would retain the last entered job code until it was changed again. Given the fact that she changed her job category to cocktailing on the first day of the job switching, her subsequent inactivity is consistent with that belief. Nor is that undermined by her inability to explain it in those terms during the exit interviews, where she was operating in an emotional state.

Under Respondent's rationale, Ostler's records should have shown classification switching during that period of time and her first day switch showed she knew how to do it. Her failure to do so, however, does not eliminate the likelihood of an honest mistake. I find it is more likely that Ostler was also operating under a second misapprehension, a belief that she had wholly switched positions with Hendricks. Her behavior suggests this is so. It is probable that she did not consider the minor variations in her schedule (based on what the shift required) to warrant clocking in under another job category. I find Ostler's testimony illustrates her confusion about the pay rate implications of the job switching.⁷ After all, the hourly pay rate differential was virtually meaningless to both Ostler and Hendricks. It only changed their gross pay by \$1.25 per hour, from \$5.50 to \$6.75, no more than \$10 per 8 hour shift. Customer gratuities were the main source of earnings for both jobs and the hourly differential had little impact on their total earnings.

Respondent attempts to bolster its argument by claiming Moon admonished both Ostler and Hendricks to punch in under the proper job codes. Hendricks, who stood to lose money by not punching in properly, did not change her job category at all during this time period, either. Accordingly, I am not convinced that Moon should be credited on the point, given her strong backing of Respondent's efforts to blunt union organizing. In the alternative, even if she did, her admonishment was not effectively carried out. Moreover, I find that, with the misunderstandings and confusion described above, the posted instructions did not override the confusion evidenced by both employees.

Moon's instructions to Ostler and Hendricks should have been more clear and Moon should have tracked the two employees' compliance. A simple question from Moon would have sufficed and the error could easily have been corrected from the outset of the job switching arrangement. Certainly Moon should have noticed the incorrect payments earlier. It may accurately be said that because of Moon's failure to supervise, Ostler is being held responsible for what it is essentially a management shortcoming.

Furthermore, Wenschlag, in an effort to show Ostler's misuse of the timeclock was not a mistake, said "She bragged that she was probably the best" concerning her skill in using the timeclock computer. I find his claim to be a transparent effort to bolster the validity of his decision to discharge her. Similarly unimpressive is Wenschlag's purported lack of concern about the letter from Modecker announcing the organization attempt as well as his self-effacing testimony that he regarded the reports of Ostler's organizing to be mere rumor. I find all these claims to be self-serving and evidence of Wenschlag's desire to cast a patina of innocence over his actions. In a similar vein, Wenschlag overstated his concerns over dishonest employees, observing that the Company operated in a heavily regulated business. The observation is true for licensed gaming employees, but there is no heightened difference for its food and beverage department over any noncasino restaurant/bar. Like any employer Wenschlag must be concerned with employee honesty; yet making it appear that his business requires greater honesty of its waitresses and bartenders because it also operates a casino says more than needs to be said. It is another exaggeration and part of the effort to justify his treatment of Ostler. Accordingly, I find Respondent's allegations of dishonesty and theft to be an exaggeration.

Respondent offered its past practice of terminating employees for what it says were similar timeclock violations. But, the situations described during testimony were not at all comparable. Cases of employees gambling at nearby casinos while on Respondent's clock or clocking in for shifts they never worked are of no assistance here. In situations such as those, there was no chance of mistake. The actions of such employees were willful and egregious. Unlike those employees, all of whom were fired, Ostler was working when she was supposed to be and committed no act of deceit to cover up her supposed "violation." Similarly, Respondent's suspension of an employee for misuse of the company's toll-free telephone number is not

⁷ THE COURT: Well, let me see if I've got this right. I mean, I—when you were working together is when you switched, or did you switch shifts altogether? In other words,—

THE WITNESS: Altogether.

THE COURT: So every—even if she wasn't there, then you would be cocktail waitressing?

THE WITNESS: Or bartending. I did both.

Q. (BY MR. COOPERMAN) Okay. Was there a primary—two days a week, Friday and Saturdays, you were cocktailing,—

A. Correct.

Q .--and April [Hendricks] bartending?

A. Yes.

Q. And on the other days of the week that you worked, how would you know whether you were going to be a cocktail waitress or a bartander?

A. You didn't till you got to work. I would get to work as—like, Trent [Costello] would leave early. I would go back behind the bar and be bartender. If we had a new person behind the bar, usually I handled training them as a bartender, even though I was cocktailing at the time.

comparable because it, too, was a scheme which went well beyond any possible mistake.

It is true that Ostler was aware, if only barely, that she was being overpaid and did not report it to any manager. Likewise, Hendricks was underpaid, but did not report it. As noted above, for both positions in question, bartending and cocktailing, customer gratuity is the main source of compensation. Both Ostler and Hendricks knew that and understood the financial implications when they entered into their job switching agreement. They traded not for the money, but to vary the nature of their work. The pay rate did not strike either of them as very important. It is clear to me that Ostler had no intent to steal from anyone; she just didn't recognize there was a record-keeping problem.

Ultimately, I can only find Ostler's failure to observe the timeclock codes to be the product of a misunderstanding at most, one which could have been avoided with proper supervision. Respondent's accusation of theft is a clear inflation of the situation. I find Respondent saw it as an opportunity and an excuse to get rid of a perceived union activist.

Respondent's defense, therefore, fails to rebut the General Counsel's prima facie case. Accordingly, I find Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Ostler because of her efforts to organize her fellow employees on behalf of the Union.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. And, as Respondent discriminatorily discharged Ostler, it will be ordered to offer her immediate reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987). Furthermore, it shall be required to expunge from Ostler's personnel file any reference to her illegal discharge. Sterling Sugars, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Teamsters Local Union No. 537, affiliated with International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
- 3. On the dates shown in the decision, Respondent violated Section 8(a)(1) when its managers and supervisors, Richard Wenschlag, Rebecca Vandiver, and Shelby Moon, interrogated employees about their union activities, sympathies, and desires

and about the union activities, sympathies, and desires of other employees.

- 4. In late January or early February, Respondent, acting through Wenschlag, violated Section 8(a)(1) by soliciting an employee to spy on the union activities of employee Maureen Ostler and to inform him of his findings
- 5. In early February, Respondent, acting through Vandiver, violated Section 8(a)(1) by threatening employees with loss of jobs for seeking representation by the Union.
- 6. The General Counsel has failed to prove that Respondent, through Vandiver, told employees that union representation was an act of futility.
- 7. On February 13, Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Maureen Ostler.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Midnight Rose Hotel & Casino, Inc., Cripple Creek, Colorado, its officers, agents, and assigns, shall

- 1. Cease and desist from
- (a) Coercively interrogating employees their union activities, sympathies, and desires and the union activities, sympathies, and desires of other employees.
- (b) Soliciting employees to spy on the union activities of their fellow employees.
- (c) Threatening employees with loss of their jobs because they seek union representation.
- (d) Discharging or otherwise disciplining employees because they engage in activity protected by Section 7 of the Act, including organizing on behalf of any labor union.
- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Maureen Ostler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.
- (b) Make Maureen Ostler whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to Ostler's unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, nec-

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

essary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its hotel and casino in Cripple Creek, Colorado, copies of the attached notice marked "Appendix." Copies of the notice. on forms provided by the Regional Director for Region 27 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 25, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remainder of the complaint be dismissed in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union activities, sympathies, and desires or the union activities, sympathies, and desires of your fellow employees.

WE WILL NOT ask any employee to spy on the union activities of fellow employees.

WE WILL NOT threaten you with loss of your jobs because you seek union representation.

WE WILL NOT discharge or otherwise discipline you if you engage in activity protected by the National Labor Relations Act, including organizing on behalf of Teamsters Local Union No. 537, affiliated with International Brotherhood of Teamsters, AFL—CIO, or any other labor union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Federal law.

WE WILL within 14 days from the date the Board's Order, offer Maureen Ostler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Maureen Ostler whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, plus interest.

WE WILL within 14 days from the date of the Board's order, remove from our files any reference to Maureen Ostler's unlawful discharge and within 3 days notify her in writing that we have done so and that the discharge will not be used against her in any way.

MIDNIGHT ROSE HOTEL & CASINO, INC.

⁹ If this Order is enforced by a judgment of the United States Court Of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."